No. 80308-1

MADSEN, C.J. (dissenting)—The evidence in this case establishes exigent circumstances justifying the warrantless search of the defendant's vehicle. Both the danger of destruction of contraband and the mobility of the vehicle, together, constitute such exigent circumstances. Unfortunately, notably absent from the majority's analysis is any significant discussion of the key issue debated by the parties in this case, whether, under article I, section 7 of the Washington State Constitution, exigent circumstances justifying a warrantless search include the mobility of a vehicle.

Perhaps the most disturbing part of the majority is that it utilizes the *Terrovona*[1] factors, which are designed to be used to determine whether incursion into the home is justified by exigent circumstances, to determine whether exigencies exist here. But this case does not involve a home, which deserves the highest protection against warrantless entry. Rather, it involves the search of an automobile, which is by definition mobile, by a lone officer in the middle of the night in rural Island County.

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[1] *State v. Terrovona*, 105 Wn.2d 632, 716 P.2d 295 (1986).

Analysis

Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." It is settled that this provision is subject to an interpretation independent from that given the Fourth Amendment to the United States Consitution. *See*, *e.g.*, *State v. Athan*, 160 Wn.2d 354, 365, 158 P.3d 27 (2007). The only question in a given case is the nature and extent of the protection afforded under article I, section 7, which in some areas is greater than that provided under the federal constitution. *Id*.; *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002).

Under our state provision, a warrantless search is per se unreasonable unless it falls within an exception to the warrant requirement. *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Exceptions include exigent circumstances. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). For the exigent circumstances exception to the warrant requirement to apply, there must be both probable cause to search and exigent circumstances that justify not obtaining a warrant. *See Patton*, 167 Wn.2d at 391 n.8; *State v. Ringer*, 100 Wn.2d 686, 700, 674 P.2d 1240 (1983), *overruled on other grounds by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). We have frequently noted that exigent circumstances include the mobility of a vehicle and the mobility or possible destruction of evidence. *E.g.*, *State v. Smith*, 165 Wn.2d 511, 521, 199 P.3d 386 (2009).

The majority refers to six nonexclusive factors that may aid in determining exigent circumstances. Majority at 6 n.3. The list is derived from *Terrovona*, a case involving

the question whether a warrantless entry into a home to effectuate an arrest was warranted. *Terrovona*, 105 Wn.2d at 644. In *Terrovona*, we noted that the United States Supreme Court in *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984), had described *Dorman v. United States*, 140 U.S. App. D.C. 313, 435 F.2d 385 (1970), "as a leading case in defining exigencies," and we listed the six "elements" from *Dorman* that "aid in determining when a warrantless police entry into a home is justified." *Terrovona*, 105 Wn.2d at 644. The factors on their face appear unhelpful in other contexts. For example, two of the factors are clearly inapplicable here: "'that there is strong reason to believe that the suspect is on the premises" and "the entry [can be] made peaceably.'" *Smith*, 165 Wn.2d at 517 (quoting *State v. Cardenas*, 146 Wn.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002)), *quoted in* majority at 6 n.3.

Nonetheless, the majority considers some of these factors when deciding whether exigencies exist here. Majority at 6. The exigencies that should be considered, though, are the ones that actually exist in this case, not exigencies that do not exist and are gleaned from a list that does not directly apply in the context here.

As mentioned, the parties debate whether the mobility of a vehicle is an exigent circumstance. Tibbles contends that this court has already held that it is not, citing *State v. Patterson*, 112 Wn.2d 731, 774 P.2d 10 (1989), and *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). In *Patterson*, the court did not find exigent circumstances justifying the search of a car when it was parked and unoccupied and the whereabouts of the driver unknown. Given its facts, *Patterson* does not stand for the broad proposition that the

mobility of a vehicle is *never* an exigent circumstance.[2] Tibbles' reliance on *Parker* is similarly misplaced because the validity of a search incident to arrest was at issue. *Parker*, 139 Wn.2d at 497 (addressing search incident to arrest exception to the warrant requirement).

Although neither *Patterson* nor *Parker* supports Tibbles' contention that the mobility of the vehicle is never an exigent circumstance, it is unnecessary in this case to decide whether the mobility of a vehicle *alone* justifies a warrantless search of a vehicle. "Although ordinarily warrantless entries are presumptively unreasonable, warrant requirements must yield when exigent circumstances demand that police act immediately." *Cardenas*, 146 Wn.2d at 405. For example, exigent circumstances exist if "delay will probably result in the destruction of evidence." *State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887 (2004) (citing *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)). The underlying rationale for the exigent circumstances exception is that a search will be justified without a warrant when obtaining a warrant is not practical because delay in obtaining a warrant would, among other possibilities, "facilitate escape or permit the destruction of evidence." *Smith*, 165 Wn.2d at 517.

Here, the evidence, in the form of stipulated facts, establishes that the mobility of the vehicle and the danger that evidence would be destroyed if Trooper Norman Larsen

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[2] We stated that "concerns for the safety of officers and potential destructibility of evidence" "outweigh privacy interests" in the contexts of searches incident to arrest and potential destructibility of evidence, but "the concerns are not the same when officers approach a parked, immobile, unoccupied, secured vehicle. In *such a situation* no bright-line rule is necessary. If exigencies in addition to potential mobility exist, they will justify a warrantless search." *Patterson*, 112 Wn.2d at 735 (emphasis added).

had delayed the search until a warrant could be procured were exigent circumstances that justified the warrantless search of Micah Tibbles' vehicle. When Trooper Larsen stopped Tibbles' vehicle late at night in late October, Tibbles was the only occupant of the car. Larsen smelled a strong odor of marijuana coming from the vehicle, and he told Tibbles that he smelled it. Tibbles, however, denied having any marijuana, and when Larsen searched Tibbles he found no marijuana. Larsen also asked Tibbles if he had smoked any marijuana that day, but Tibbles denied doing so.

At this point, the trooper had a reasonable basis to believe that marijuana was in the vehicle given the "strong odor" that he detected and the fact that the vehicle was the only remaining place it could reasonably be found. As for Tibbles, because Larsen had inquired about marijuana possession and use, Tibbles was alerted to the officer's suspicion that he had the drug. Mr. Tibbles thus had a strong motive to avoid Larsen's discovery of the marijuana.

Tibbles could have, because of the vehicle's mobility, easily and quickly driven himself and the evidence away from the scene if Larsen, who was alone, had delayed the search while attempting to procure a warrant. He also could have, because of the kind of evidence at issue, easily and quickly disposed of or destroyed the evidence of marijuana use or possession. Contrary to the majority's apparent belief that securing a timely search warrant in the middle of the night, in a rural area, is an easy matter, the facts show that the officer was alone, either had to remain with the vehicle, the suspect, and the evidence in order to prevent flight or destruction of evidence or seek to obtain a warrant, increasing

the risk of one of these events happening.

Regardless of whether the mobility of the vehicle was, alone, enough to establish exigent circumstances, the evidence, objectively viewed, establishes that the combination of mobility and the danger of destruction of evidence together constitute exigent circumstances under our precedent.[3] It is the confluence of the likely presence of evidence consisting of marijuana, which could easily be destroyed or disposed of from the vehicle, Tibbles' having been alerted to the officer's suspicion that there was evidence of marijuana use or possession in the vehicle, and the mobility of the vehicle itself, which could easily be driven away, that creates the exigent circumstances in this case.

This reasoning is supported by many other courts that have addressed the same or similar circumstances involving the smell of marijuana from a vehicle. *See*, *e.g.*, *United States v. Stevie*, 578 F.2d 204, 210 (8th Cir. 1977) (automobile was stopped on a busy highway shortly after midnight; odor of marijuana detected; exigent circumstances justified an immediate search); *State v. Chavez-Inzunza,* 145 Ariz. 362, 364, 701 P.2d 858, 860 (1985) (mobile character of the vehicle as well as the odor of marijuana supplied exigent circumstances justifying a search); *McDaniel v. State*, 65 Ark. App. 41, 985 S.W.2d 320 (1999) (odor of marijuana emanating from vehicle stopped on a rural road at 1:00 in the morning justified warrantless search under exigent circumstances

[3] Prior to the search of the vehicle in the present case, Trooper Larsen had no way of knowing what charge or citation might be justified by the evidence obtained. If greater than 40 grams of marijuana had been found during the search, a felony arrest would have been an appropriate charge. *See* former RCW 69.50.204(14) (1993); RCW 69.50.401(2)(c); RCW 69.50.4014. No misdemeanor arrest had occurred or was certain when Larsen began his search.

exception); *People v. Cook*, 13 Cal. 3d 663, 532 P.2d 148, 119 Cal. Rptr. 500 (1975) (car stopped for speeding; odor of raw marijuana detected; exigent circumstances made obtaining a search warrant impractical, including the time of night and the fact that the car was on a deserted highway); *Ingle v. Superior Court*, 129 Cal. App. 3d 188, 181 Cal. Rptr. 39 (1982) (police stopped a car for speeding; smelled raw marijuana; had probable cause to search; warrantless search justified); *State v. Pagett*, 684 So. 2d 1072, 1074 (La. App. 1996) (odor of marijuana justified warrantless search of automobile under exigent circumstances); *Moulden v. State*, 576 S.W.2d 817, 819-20 (Tex. Crim. App. 1978) (officers detected odor of burnt marijuana emanating from vehicle after valid stop; warrantless search of automobile justified by exigent circumstances); *State v. Maycock*, 947 P.2d 695 (Utah App. 1997) (exigent circumstances existed justifying warrantless search of vehicle when officer stopped defendant's vehicle; defendant was alerted to the police presence, if police attempted to secure warrant, defendant may have fled).

Because I believe that the evidence shows that exigent circumstances existed under the facts of this case, I would conclude that the officer's warrantless search of the vehicle was justified. Accordingly, I dissent from the majority's contrary view.

Turning to another matter, the actual charging instrument is not in the record and Tibbles does not claim that he was charged with or convicted of conduct that is not a crime. However, it is not illegal to *merely possess* drug paraphernalia in this state, although it is illegal to *use* drug paraphernalia. *State v. Walker*, 157 Wn.2d 307, 138 P.3d 113 (2006); *State v. O'Neill*, 148 Wn.2d 564, 584 n.8, 62 P.3d 489 (2003); *see* RCW

69.50.412(1). Documents in the record indicate that Tibbles was nevertheless charged with and convicted of *possession* of drug paraphernalia. *See* Clerk's Papers (CP) at 50 (trial judge found that "defendant had unlawful constructive possession of the marijuana and paraphernalia"); CP at 2 (Court of Appeals Commissioner's Ruling Granting Discretionary Review states that Tibbles sought discretionary review of, in part, his conviction for "possession of drug paraphernalia"); CP at 22 (Br. of the Resp't on RALJ Appeal stated that Tibbles was charged with "Possession of Drug Paraphernalia"). It is possible that Tibbles was convicted of a nonoffense.

Conclusion

The mobility of Mr. Tibbles' vehicle, together with the possible destruction of evidence that might have occurred if Trooper Larsen had delayed his search until he had taken the time to procure a warrant, were exigent circumstances that justified the warrantless search of Mr. Tibbles' vehicle. Therefore, I would affirm the Court of Appeals and uphold Mr. Tibbles' conviction for possession of marijuana.

Mr. Tibbles has not challenged his conviction for possession of drug paraphernalia, and the charging instrument is not in the record. Therefore, although it appears that he may have been convicted of a nonoffense (there is no such offense under state statutes), the issue is not properly before the court and cannot be resolved on this record.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson